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REPORT
100-263

SELECTION OF VENUE FOR MULTIPLE APPEALS OF AGENCY ORDERS

DECEMBER 16 (legislative day, DECEMBER 15), 1987.—Ordered to be printed

Mr. BIDEN, from the Committee on the Judiciary, submitted the following

REPORT

[To accompany S. 1134]

The Committee on the Judiciary, to which was referred the bill S. 1134 to amend Title 28, United States Code, to provide for the selection of the court of appeals to decide multiple appeals filed with respect to the same agency order, having considered the same, reports favorably thereon without amendment and recommends that the bill do pass.

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I. PURPOSE

The purpose of S. 1134 is to amend the "first to file" rule currently utilized by courts when Federal agency orders are appealed. The bill simplifies the selection of the proper court to handle the judicial appeal of an agency order in those cases where petitions for review are filed in more than one court of appeals.

S523-13

II. Legislative History and Background

When a Federal agency issues an order, two or more parties often file judicial challenges to the validity of that order. Because many statutes do not specify a particular circuit as the court to handle these challenges, venue for the judicial challenge is often proper in any of the Federal circuits in which challenges are filed. If appeals are filed in more than one circuit, a single circuit must be selected to handle the appeal.

Until 1958, an agency had the option of selecting which circuit would have venue when appeals of the agency's order were properly filed in more than one circuit. Since this was perceived to result in an unfair advantage to the agency, Title 28 of the United States Code was amended in 1958 to provide that the proper circuit of venue would be the circuit where the appeal of the agency order was first filed. This "first-to-file" rule was intended to introduce balance and fairness into the selection of a court of venue by simply allowing the circuit where the first challenge was filed to be the court of venue.

However, the 1958 amendment had an unintended effect. Many lawyers perceive that particular circuits will be more sympathetic to their client's arguments. Thus, "races to the courthouse" began to occur, with each lawyer trying to file first in the circuit he or she feels will be receptive, or to avoid hostile circuit precedent.

Races to the courthouse have become highly sophisticated. Messengers are often assigned to hover around agency offices waiting for the exact moment an appealable order or rule is issued or promulgated. Other messengers, armed with petitions for filing the appeal, are stationed at the offices of the clerks of various circuits. The two may be connected by long-distance telephone lines or walkie-talkies, so that the appeal can be filed in a particular circuit at the precise instant the agency order is issued. All of these methods are undertaken for the avowed purpose of filing an appeal a fraction of a second sooner than another litigant. The result is that filings are frequently made in various circuits within minutes, or even seconds, of each other.

In 1980, the Administrative Conference of the United States, which has carefully examined this issue and which originally recommended the changes contained in S. 1134, described the situation that has developed:

> [The "first to file" rule] has become less and less useful as the choice of forum has become more significant in lawyers' minds, and races to the courthouse have proliferated and methods of conducting the races have become more refined. Races are now sometimes decided by seconds or fractions of seconds, if they can fairly be said to have been decided at all. (There is no single finish line to cross or tape to break; time stamping machines in clerks' offices are not synchronized.) Moreover, races will be even harder to judge as agencies adopt regulations, designed to make the races fairer and more civilized, specifying the date and time at which the agency orders are deemed to have been issued. See, Administrative Conference Recommendation Number 80-5 "Eliminating or Simplifying the 'Race to the

> Courthouse' in Appeals from Agency Action." (December 12, 1980)

The committee has examined this situation and has concluded, as had the Administrative Conference, that races to the courthouse have resulted in unfortunate consequences for the system of justice. Since these races are based on the theory that one court will interpret the law differently from another court, they detract from the public's perception of the Federal courts as impartial, consistent arbiters of justice. In addition, these races produce no economic benefit, yet often cost private participants tens of thousands of dollars. It is estimated that the total expense incurred by the parties in one recent case was about $35,000. And in that case, it turned out that all of the parties were racing to the same courthouse.

Finally, once the race is complete, these parties—as well as the Federal courts and agencies—must then expend more resources on wasteful litigation to determine who "won" the race and thus which court is the appropriate circuit for review. For example, in one such race extravaganza, petitions for review of a Federal Energy Regulatory Commission order were filed in the Fifth and D.C. circuits at approximately 3:02 p.m. EDT. Proceeding on orders from the Commission and pursuant to court order, an administrative law judge re-enacted over the course of three days the exact chain of procedures used by each of the filing parties to determine who had actually filed first. This determination was remanded to him by the court for a second round so as to secure a determination accurate to the precise second.[1]

A recent Fifth Circuit case illustrates the judicial exasperation with current practice. *Mobil Oil Exploration Co.* v. *FERC*, 814 F.2d 998 (5th Cir. 1987). In this case, Mobil Oil and United Distribution Co. had raced to the Fifth Circuit and the D.C. Circuit, respectively, for review of a FERC order. Mobil claimed to have filed one second before United, who responded that Mobil's filing was invalid because it was filed four-tenths of a second before the FERC order was ripe for review. The court noted that the parties asserted they had estimated the functioning of file stamp clerks by "audible clicks" in the clock's mechanism.

The court fearfully observed:

> It should be obvious to even the mechanically inept that if courts let themselves get drug down this slippery slope of splitting minutes on digital watches worn by parties and timed by calls to the Naval Observatory, the next generation of races will be run by split-second electronic timing devices and laser transmissions or some other esoteric procedures which distort the statutory purpose still further. Id at 1000.

Notwithstanding the obvious need for reform of this area of administrative law, legislative efforts have met with frustration.[2] In

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[1] See, McGarity, "Multi-party Forum Shopping for Appellate Review of Administrative Action," 1980 Rep. & Recommendation, Administrative Conference of the U.S., 437, 455–57, also reprinted in 129 U. Pa. L. Rev. 302, 320–22 (1980).

[2] Breger, "Races to Courthouse Exasperate Judges, Waste Litigants' Time," Legal Times, July 20, 1987, p. 17.

1982, the Senate passed a race to the courthouse provision as part of S. 1080, the Laxalt-Leahy regulatory reform package, but the House did not pass that legislation before the end of the 97th Congress. In 1984, the House passed a "race" bill, H.R. 5365, but the Senate failed to act. The House passed a "race" bill (H.R. 439) again in 1985. However, the Senate-passed version of the bill contained several unrelated amendments, added in the final days of the 99th Congress. The House adjourned without considering the amended bill.

In the 100th Congress, Senator Grassley introduced this bill, with Senators DeConcini and Thurmond, on May 5, 1987. The Subcommittee on Courts and Administrative Practice unanimously approved the bill on November 18, 1987. The House unanimously passed an identical bill to S. 1134 (H.R. 1162) on May 27, 1987.

III. Discussion

S. 1134 provides that, when petitions for judicial review of an agency order have been filed in more than one circuit, the Judicial Panel on Multidistrict Litigation (Judicial Panel) will choose a circuit from among those in which petitions have been filed to review the order. This choice will be made by a system of random selection.

For a circuit to be among those from which the random selection is made, two conditions must be met. First, a party who filed in the circuit must have appealed the agency order within 10 days after issuance of the order. Second, that party must have filed a copy of the petition for review with the agency within the same 10-day period.

If, within 10 days of issuing an order, the agency has received copies of filed petitions which indicate that appeals of an order have been instituted in two or more circuits, the agency must promptly notify the Judicial Panel of this fact and of the identity of these circuits.

As soon as is practicable after the Judicial Panel receives notification from an agency of multiple filings and the circuits of those filings, the Judicial Panel will conduct a random selection among these circuits. The system for selection shall include one entry for each circuit in which appeals are pending, rather than one entry for each petitioner or proceeding.

After the selection of a circuit by random selection, the Judicial Panel will issue an order consolidating the petitions for review in the selected circuit.

No random selection will be required if a second proceeding is commenced more than 10 days after issuance of the agency order or if all proceedings are filed later than 10 days after the issuance of the order. In these cases, the "first-to-file" will continue in effect. If a party files for review within 10 days of the issuance of the order but does not submit a copy of the petition for review to that agency within 10 days of the issuance of the order, the circuit in which this party filed would not qualify for the random selection procedure unless another party who filed in that circuit has submitted a copy of the petition for review with the agency within 10 days of the issuance of the order. When only one petitioner has

filed an appeal or when all petitions are filed in the same circuit, no selection is necessary.

The Judicial Panel is required to establish rules to govern these selection procedures after providing the public with notice and an opportunity to comment on such rules. The purpose of this notice requirement is to allow public involvement in the development of these rules. It does not subject these rules, which are administrative in nature, to the rulemaking requirements of the Administrative Procedure Act (5 U.S.C. 553) or to judicial challenge.

During the period before the random selection is completed, any court of appeals in which a proceeding has been filed may stay the effective date of the agency order. Any such stays may thereafter be modified, revoked, or extended by the court in which the proceedings are consolidated after the random selection process. S. 1134 does not provide any new authority for courts to stay the effective date of agency orders.

The circuit court in which the proceedings are consolidated will take jurisdiction over all review proceedings dealing with the same order. S. 1134 is not intended to change the practice of having sequential or closely related orders issued in the course of the same or interrelated administrative proceedings treated as "the same order" and reviewed by the circuit court reviewing the initial order. See, e.g., BASF Wyandotte Corporation v. *Costle,* 582 F.2d 108, 112 (1st Cir. 1978); *American Civil Liberties Union* v. *Federal Communications Commission,* 486 F.2d 411, 414 (D.C. 1973).

The selected court will retain its existing power to transfer all review proceedings dealing with the same order. Thus, S. 1134 does not, in any way, prevent the selected court from transferring the challenges to the agency order to a more proper circuit "[f]or the convenience of the parties in the interest of justice" 18 U.S.C. 2112(a)(5) (as redesignated by S. 1134).

S. 1134 does contain one provision that differs from its predecessors. This provision, Section 2, would repeal a provision of the Federal Water Pollution Control Act, which was enacted earlier this year. This Act established a different and inconsistent "race to the courthouse" mechanism for orders issued under the Clean Water Act. By repealing this provision, the judicial review of the orders of all agencies under all statutes will be subject to the identical random selection process, and the courts, agencies, and litigants will not have to deal with differing provisions addressed to the same goal. Thus, if S. 1134 is enacted, multiple challenges to agency orders issued under the Clean Water Act, as amended, will be covered by this bill's provisions, as will orders issued under all other statutory authority.

S. 1134 represents a significant improvement in the way venue is determined in cases of multiple agency appeals. It is supported by the Department of Justice, the Judicial Conference of the United States, the Administrative Conference of the United States, and the American Bar Association. The committee recommends that the Senate act favorably on this bill.

IV. Text of S. 1134, as Reported

[S. 1134, 100th Cong., 1st Sess.]

A BILL To amend title 28, United States Code, to provide for the selection of the court of appeals to decide multiple appeals filed with respect to the same agency order

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SELECTION OF COURT FOR MULTIPLE APPEALS.

Section 2112(a) of title 28, United States Code, is amended by striking out the last three sentences and inserting in lieu thereof the following: "If proceedings are instituted in two or more courts of appeals with respect to the same order, the following shall apply:

"(1) If within ten days after issuance of the order the agency, board, commission, or officer concerned receives, from the persons instituting the proceedings, the petition for review with respect to proceedings in at least two courts of appeals, the agency, board, commission, or officer shall proceed in accordance with paragraph (3) of this subsection. If within ten days after the issuance of the order the agency, board, commission, or officer concerned receives, from the persons instituting the proceedings, the petition for review with respect to proceedings in only one court of appeals, the agency, board, commission, or officer shall file the record in that court notwithstanding the institution in any other court of appeals of proceedings for review of that order. In all other cases in which proceedings have been instituted in two or more courts of appeals with respect to the same order, the agency, board, commission, or officer concerned shall file the record in the court in which proceedings with respect to the order were first instituted.

"(2) For purposes of paragraph (1) of this subsection, a copy of the petition or other pleading which institutes proceedings in a court of appeals and which is stamped by the court with the date of filing shall constitute the petition for review. Each agency, board, commission, or officer, as the case may be, shall designate by rule the office and the officer who must receive petitions for review under paragraph (1).

"(3) If an agency, board, commission, or officer receives two or more petitions for review of an order in accordance with the first sentence of paragraph (1) of this subsection, the agency, board, commission, or officer shall, promptly after the expiration of the ten-day period specified in that sentence, so notify the judicial panel on multidistrict litigation authorized by section 1407 of this title, in such form as that panel shall prescribe. The judicial panel on multidistrict litigation shall, by means of random selection, designate one court of appeals, from among the courts of appeals in which petitions for review have been filed and received within the ten-day period specified in the first sentence of paragraph (1), in which the record is to be filed, and shall issue an order consolidating the petitions for review in that court of appeals. The judicial panel on multidistrict litigation shall, after providing notice to the

public and an opportunity for the submission of comments, prescribe rules with respect to the consolidation of proceedings under this paragraph. The agency, board, commission, or officer concerned shall file the record in the court of appeals designated pursuant to this paragraph.

"(4) Any court of appeals in which proceedings with respect to an order of an agency, board, commission, or officer have been instituted may, to the extent authorized by law, stay the effective date of the order. Any such stay may thereafter be modified, revoked, or extended by a court of appeals designated pursuant to paragraph (3) with respect to that order or by any other court of appeals to which the proceedings are transferred.

"(5) All courts in which proceedings are instituted with respect to the same order, other than the court in which the record is filed pursuant to this subsection, shall transfer those proceedings to the court in which the record is so filed. For the convenience of the parties in the interest of justice, the court in which the record is filed may thereafter transfer all the proceedings with respect to that order to any other court of appeals.".

SEC. 2. CONFORMING AMENDMENT.

Section 509(b) of the Federal Water Pollution Control Act (33 U.S.C. 1369(b)) is amended by striking out paragraph (3) and redesignating paragraph (4) as paragraph (3).

SEC. 3. EFFECTIVE DATE.

The amendments made by this Act take effect 180 days after the date of the enactment of this Act, except that the judicial panel on multidistrict litigation may issue rules pursuant to subsection (a)(3) of section 2112 of title 28, United States Code (as added by section 1) on or after such date of enactment.

V. Section-by-Section Analysis

SECTION 1. MULTIPLE FILINGS

Section 1 amends Section 2112(a) of title 28 to address those situations in which petitions for review of an agency order are filed in more than one circuit.

New Section 2112(a)(1) sets forth the three types of situations in which more than one petition for review is filed and the method for determining venue in each of those situations.

When persons instituting proceedings for review of an agency order file copies of the petition for review with the agency within 10 days of the order's issuance, the agency shall determine if these petitions show that proceedings have been filed in two or more courts. If so, the agency will file the record in the circuit chosen by the random selection procedures established under new Section 2112(a)(3).

If, in the first 10 days after the issuance of an agency order, the agency receives petitions for review from the persons instituting the proceedings which show that proceedings have been filed in only one circuit, the agency shall file the record in that circuit.

In all other cases in which more than one petition for review has been filed, the agency shall file the record in the circuit in which proceedings were first instituted.

New Section 2112(a)(2) provides that the "petition for review" for purposes of paragraph (1) of this section consists of a copy of the petition or other pleadings instituting proceedings in a court of appeals which is stamped by the court with the date of filing. Each agency is required to designate by rule the office and officer who shall receive the petitions for review under paragraph (1).

New Section 2112(a)(3) provides that an agency shall promptly notify the Judicial Panel on Multidistrict Litigation when it receives notification that two or more petitions for review of an agency order were filed in various circuits within 10 days of the issuance of the order. The Judicial Panel shall then, by means of random selection, designate one court of appeals from among those courts in which timely petitions have been filed and shall issue an order consolidating the petitions for review in that court. The agency shall then file the record for review in the court of appeals designated pursuant to this paragraph. The Judicial Panel shall, after providing notice to the public and an opportunity for the submission of comments, prescribe rules for the consolidation of proceedings under the paragraph.

New Section 2112(a)(4) provides that any court of appeals in which proceedings with respect to an agency order have been instituted may, to the extent authorized by law, stay the effective date of the order. Any such stay may thereafter be modified, revoked, or extended by the court of appeals designated under new paragraph (3) of this section or by any other court of appeals to which the proceedings are transferred by the selected court.

New Section 2112(a)(5) directs all courts in which proceedings are instituted with respect to the same agency order, other than the court in which the record is filed pursuant to this subsection, to transfer those proceedings to the court in which the record is filed. This court may, thereafter, transfer all proceedings with respect to the order to any other court of appeals for the convenience of the parties in the interest of justice.

SECTION 2. CONFORMING AMENDMENT

Section 2 is a conforming amendment which repeals a provision enacted as part of the Federal Water Pollution Control Act. This provision established a mechanism for the selection of the court of appeals if multiple challenges are filed to agency orders issued under the Clean Water Act, as amended. The specific mechanism contained in this provision is inconsistent with the generally applicable mechanism established by S. 1134. Thus, S. 1134 would repeal this inconsistent provision.

SECTION 3. EFFECTIVE DATE

Section 3 provides that the amendments made by this Act shall take effect 180 days after the enactment, except that the Judicial Panel on Multidistrict Litigation may issue rules pursuant to new subsection (a)(3) of Section 2112 of Title 28 on or after such date of enactment.

VI. Cost Estimate

U.S. Congress,
Congressional Budget Office,
Washington, DC, December 7, 1987.

Hon. Joseph R. Biden,
Chairman, Committee on the Judiciary,
U.S. Senate, Washington, DC.

Dear Mr. Chairman: The Congressional Budget Office has reviewed S. 1134, a bill to amend title 28, United States Code, to provide for the selection of the court of appeals to decide multiple appeals filed with respect to the same agency order, as ordered reported by the Senate Committee on the Judiciary, December 3, 1987. We estimate that a small savings to the federal government, and no costs to state or local governments will result from enacting this bill.

S. 1134 is intended to remedy the dispute that occurs when parties file appeals in different courts in response to the same orders of administrative agencies, boards, commissions, or officers. Since these appeals are sometimes filed simultaneously, court time and expense must be used to determine which appeal was filed first, and consequently, which court will review all appeals with respect to that agency order. Under the bill, if two or more appeals are filed within 10 days after the issuance of the order, and the body that issued the order is notified of the appeal by each appellant, then the court to review the appeal will be randomly selected by the judicial panel on multidistrict litigation. In all other instances where two or more appeals are filed, the agency will file the record in the court where proceedings were first instituted. The bill will enable these time-consuming decisions to be removed from the courts, resulting in a small savings to the federal government. The bill's provisions will take effect 180 days following the enactment date.

If you wish further details on this estimate, we will be pleased to provide them.

With best wishes,
Sincerely,

Edward M. Gramlich, *Acting Director.*

VII. Regulatory Impact Statement

Pursuant to paragraph 11(b), Rule XXVI of the Standing Rules of the Senate, the Committee, after due consideration, concludes that the Act will not have direct regulatory impact.

VIII. Changes in Existing Law

In compliance with paragraph 12 of rule XXVI of the Standing Rules of the Senate, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, existing law in which no change is proposed is shown in roman):

UNITED STATES CODE

* * * * * * *

TITLE 28

* * * * * * *

§ 2112. Record on review and enforcement of agency orders

(a) The rules prescribed under the authority of section 2072 of this title may provide for the time and manner of filing and the contents of the record in all proceedings instituted in the courts of appeals to enjoin, set aside, suspend, modify, or otherwise review or enforce orders of administrative agencies, boards, commissions, and officers. Such rules may authorize the agency, board, commission, or officer to file in the court a certified list of the materials comprising the record and retain and hold for the court all such materials and transmit the same or any part thereof to the court, when and as required by it, at any time prior to the final determination of the proceeding, and such filing of such certified list of the materials comprising the record and such subsequent transmittal of any such materials when and as required shall be deemed full compliance with any provision of law requiring the filing of the record in the court. The record in such proceedings shall be certified and filed in or held for and transmitted to the court of appeals by the agency, board, commission, or officer concerned within the time and in the manner prescribed by such rules. [If proceedings have been instituted in two or more courts of appeals with respect to the same order the agency, board, commission, or officer concerned shall file the record in that one of such courts in which a proceeding with respect to such order was first instituted. The other courts in which such proceedings are pending shall thereupon transfer them to the court of appeals in which the record has been filed. For the convenience of the parties in the interest of justice such court may thereafter transfer all the proceedings with respect to such order to any other court of appeals.] *If proceedings are instituted in two or more courts of appeals with respect to the same order, the following shall apply:*

(1) If within ten days after issuance of the order the agency, board, commission, or officer concerned receives, from the persons instituting the proceedings, the petition for review with respect to proceedings in at least two courts of appeals, the agency board, commission, or officer shall proceed in accordance with paragraph (3) of this subsection. If within ten days after the issuance of the order the agency, board, commission, or officer concerned receives from the persons instituting the proceedings, the petition for review with respect to proceedings in only one court of appeals, the agency, board, commission, or officer shall file the record in that court notwithstanding the institution in any other court of appeals of proceedings for review of that order. In all other cases in which proceedings have been instituted in two or more courts of appeals with respect to the same

order, the agency, board, commission, or officer concerned shall file the record in the court in which proceedings with respect to the order were first instituted.

(2) For purposes of paragraph (1) of this subsection, a copy of the petition or other pleading which institutes proceedings in a court of appeals and which is stamped by the court with the date of filing shall constitute the petition for review. Each agency, board, commission, or officer, as the case may be, shall designate by rule the office and the officer who must receive petitions for review under paragraph (1).

(3) If an agency, board, commission, or officer receives two or more petitions for review of an order in accordance with the first sentence of paragraph (1) of this subsection, the agency, board, commission, or officer shall, promptly after the expiration of the ten-day period specified in that sentence, so notify the judicial panel on multidistrict litigation authorized by section 1407 of this title, in such form as that panel shall prescribe. The judicial panel on multidistrict litigation shall, by means of random selection, designate one court of appeals, from among the courts of appeals in which petitions for review have been filed and received within the ten-day period specified in the first sentence of paragraph (1), in which the record is to be filed, and shall issue an order consolidating the petitions for review in that court of appeals. The judicial panel on multidistrict litigation shall, after providing notice to the public and an opportunity for the submission of comments, prescribe rules with respect to the consolidation of proceedings under this paragraph. The agency, board, commission, or officer concerned shall file the record in the court of appeals designated pursuant to this paragraph.

(4) Any court of appeals in which proceedings with respect to an order of an agency, board, commission, or officer have been instituted may, to the extent authorized by law, stay the effective date of the order. Any such stay may thereafter be modified, revoked, or extended by a court of appeals designated pursuant to paragraph (3) with respect to that order or by any other court of appeals to which the proceedings are transferred.

(5) All courts in which proceedings are instituted with respect to the same order, other than the court in which the record is filed pursuant to this subsection, shall transfer those proceedings to the court in which the record is so filed. For the convenience of the parties in the interest of justice, the court in which the record is filed may thereafter transfer all the proceedings with respect to that order to any other court of appeals.

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SECTION 509 OF THE FEDERAL WATER POLLUTION CONTROL ACT

SEC. 509. ADMINISTRATIVE PROCEDURE AND JUDICIAL REVIEW.

* * * * * * *

(b) REVIEW OF ADMINISTRATOR'S ACTIONS.—

* * * * * * *

[(3) VENUE.—

[(A) SELECTION PROCEDURE.—If applications for review of the same agency action have been filed under paragraph (1) of this subsection in 2 or more Circuit Courts of Appeals of the United States and the Administrator has received written notice of the filing of one or more applications within 30 days or less after receiving written notice of the filing of the first application, then the Administrator shall promptly advise in writing the Administrative Office of the United States Courts that applications have been filed in 2 or more Circuit Courts of Appeals of the United States, and shall identify each court for which he has written notice that such applications have been filed within 30 days or less of receiving written notice of the filing of the first such application. Pursuant to a system of random selection devised for this purpose, the Administrative Office thereupon shall, within 3 business days of receiving such written notice from the Administrator, select the court in which the record shall be filed from among those identified by the Administrator. Upon notification of such selection, the Administrator shall promptly file the record in such court. For the purpose of review of agency action which has previously been remanded to the Administrator, the record shall be filed in the Circuit Court of Appeals of the United States which remanded such action.

[(B) ADMINISTRATIVE PROVISIONS.—Where applications have been filed under paragraph (1) of this subsection in two or more Circuit Courts of Appeals of the United States with respect to the same agency action and the record has been filed in one of such courts pursuant to subparagraph (A), the other courts in which such applications have been filed shall promptly transfer such applications to the Circuit Court of Appeals of the United States in which the record has been filed. Pending selection of a court pursuant to subparagraph (A), any court in which an application has been filed under paragraph (1) of this subsection may postpone the effective date of the agency action until 15 days after the Administrative Office has selected the court in which the record shall be filed.

[(C) TRANSFERS.—Any court in which an application with respect to any agency action has been filed under paragraph (1) of this subsection, including any court selected pursuant to subparagraph (A), may transfer such application to any other Circuit Court of Appeals of the United States for the convenience of the parties or otherwise in the interest of justice.]

[(4)]*(3)* AWARD OF FEES.—In any judicial proceeding under this subsection, the court may award costs of litigation (including reasonable attorney and expert witness fees) to any prevailing or substantially prevailing party whenever it determines that such award is appropriate.

IX. Vote of the Committee

On December 3, 1987, with a quorum present, by voice vote, the Committee on the Judiciary ordered the bill reported, without amendment.

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